The State then presented its case. The victim testified and was subjected to cross-examination. After the State rested, defense counsel announced that Moeck decided not to testify. At this point, the prosecutor requested a curative instruction to diminish the prejudice from the now unsubstantiated opening statement. Counsel and the court then discussed how such an instruction might be worded. The prosecutor also asked what, if any, closing argument she could present to the jury in response. The prosecutor was concerned that she ran the risk of crossing the line into improper comment on Moeck's right not to testify if she referred to counsel's failure to substantiate his argument with Moeck's testimony. *See*

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> and, in fact, he does spend the evening at Rich's apartment. . . .
>
> The next morning they wake up and they discuss this marijuana and Rich says, well, I only want 20 or $30 worth. Rich then goes out into the hallway where the bathrooms are. He doesn't have a bathroom in his apartment. It's out in the hallway. He goes out there. He comes back in, and he notices that the money that was on the counter is now gone. It's missing, and he asks [S.], well, where's the money, and [S.] denies, well, I don't have the money. And he says, where's the money, and finally [S.] says, okay, I've got it, and he pulls it out of his sock and gives him his money. At that point Rich is mad and he kicks and pushes him out of the apartment, kicks him out of the building, out the back fire door which is just outside of his apartment door.
>
> At that point [S.] is gone. Rich goes back into his apartment, grabs something to eat, goes back to sleep, and then he's awakened at 11 or a little after 11 o'clock by the police that morning and they execute a search warrant and Rich is arrested.
>
> And that story, ladies and gentlemen, is the only story that's been consistent throughout this case.

App. A15-16, ¶46. *See also* App. A75-76.

*Griffin v. California,* 380 U.S. 609 (1965). The court recognized this problem and concluded that "the State under the circumstances now would be entitled to a mistrial if they wanted one." App. A90. After further deliberation, the prosecutor requested a mistrial, which the court granted. *See* App. A85-92.

The trial court denied Moeck's motion to dismiss before the start of the fourth trial on double jeopardy grounds. App. A93-96. The Wisconsin Court of Appeals granted his petition for interlocutory appeal, but summarily affirmed. In doing so, it deferred to the trial judge's exercise of discretion to declare a mistrial. App. A3-4, ¶11, and App. A38-39, ¶¶109-112 (Prosser, J. dissenting).

Moeck's fourth trial ended with a jury verdict convicting him of two counts of first degree sexual assault, one count of false imprisonment, one count of robbery, and one count of intimidation of a witness. He was sentenced to a total of 161 years in prison on the several offenses.

On direct appeal, the Wisconsin Court of Appeals rejected Moeck's petition for a writ of habeas corpus. App. A4, ¶13 and App. A39-40, ¶114 (Prosser J. dissenting). The trial court denied Moeck's subsequent collateral motion for postconviction relief, which asserted, *inter alia*, that his fourth trial violated the Double Jeopardy Clause. App. A4, ¶14. The Wisconsin Court of Appeals reversed, holding that Moeck's conviction was obtained in violation of his right to be free from double jeopardy. It effectively overruled its two previous rulings on this precise issue. App. A63-74.

By a 4-2 vote, the Wisconsin Supreme Court affirmed. The court noted that *Arizona v. Washington* mandates that the trial court's holding "'is entitled to special respect,'" App. A13, ¶41 n.22 (quoting 434 U.S. at 510), but elaborated

that, "[b]ecause of the constitutional implications of double jeopardy, an appellate court must satisfy itself that a [trial] court exercised 'sound discretion' in declaring a mistrial." App. A13, ¶42. The court then set forth a litany of requirements it had adopted in an earlier decision that a trial court must meet to exercise "sound discretion": it must "'act[] in a rational and reasonable manner'"; "'act[] in a deliberate manner taking sufficient time in responding to a prosecutor's request for a mistrial'"; "giv[e] both parties a full opportunity to explain their positions and consider[] alternatives such as a curative instruction or sanctioning counsel"; "ensure that the record reflects that there is an adequate basis for a finding of manifest necessity"; and not "'base[] its conclusion on an error of law.'" App. A13-14, ¶43 (quoting *State v. Seefeldt*, 2003 WI 47, ¶¶36-37, 261 Wis. 2d 383, 661 N.W.2d 822, ¶¶36-37).

The Wisconsin Supreme Court then turned to the facts of this case. After finding that defense counsel had not engaged in bad faith, the court ruled "that the [trial] court did not exercise sound discretion in declaring a mistrial when it failed to give adequate consideration to the State's ability to refer to the defendant's silence and to the effectiveness of a curative jury instruction." App. A23, ¶71. According to the Wisconsin Supreme Court, the trial "court overstated the difficulty the prosecuting attorney would have in both commenting on the weakness of the opening statement and avoiding error by referring to the defendant's failure to testify." App. A23, ¶73. The court found that the prosecutor could have "referr[ed] to defense counsel's opening statement as unsubstantiated" in closing argument, and the judge could have provided "a curative jury instruction that opening and closing statements are arguments, not evidence." App. A26-27, ¶¶77-79. This, held the court, "would have cured any possible prejudice resulting from defense counsel's opening statement." App. A27, ¶79.

Justices Wilcox and Prosser each filed a dissenting opinion that the other joined. Justice Wilcox's dissent pointed to the "deferential standard of review set forth in *Washington*" and stated that, "[d]espite the fact that the [trial] court *could have* issued a curative instruction informing the jury that statements of counsel are not evidence, I would not second-guess the decision of the [trial] court to not do so." App. A28, 30, ¶¶83, 86. He noted that, "[h]ere, defense counsel did not simply allude to the testimony of a minor witness who never testified; he presented the entire defense theory of the case to the jury without actually presenting any evidence." App. A30, ¶86. Justice Wilcox also expressed the "concern that the majority opinion opens the door to gamesmanship by unscrupulous and savvy defendants." App. A32, ¶92.

Justice Prosser's dissent added the concern that "the more effective the prosecutor's commentary" in closing argument regarding defense counsel's opening statement, "the more likely Moeck would have had a claim for ineffective assistance of counsel if he were convicted." App. A62, ¶174. All told, in light of all the nuances of the case, "the majority's conclusory determination that the [trial] court erred as a matter of law in its exercise of discretion is a virtual repudiation of the sound policies outlined in *Arizona v. Washington*." App. A62, ¶176.

On June 10, 2005, this Court, per Justice Stevens, issued an order granting the State's stay application "pending the timely filing and disposition of a petition for a writ of certiorari."

## REASONS FOR GRANTING THE WRIT

### I. THE WISCONSIN SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *ARIZONA V. WASHINGTON.*

The Double Jeopardy Clause allows a trial judge to declare a mistrial over defense objection if the judge finds there is a "manifest necessity" for it or "'the ends of public justice would otherwise be defeated'" if the trial were to continue. *Illinois v. Somerville,* 410 U.S. 458, 461 (1973), (quoting *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). *See United States v. Dinitz,* 424 U.S. 600, 606-07 (1976). In *Arizona v. Washington, supra,* this Court addressed how appellate courts, considering double jeopardy claims, should review mistrials caused by an improper opening statement by defense counsel. It is impossible to square the Wisconsin Supreme Court's holding in this case with the rules announced in *Arizona v. Washington.*

1. The Court in *Arizona v. Washington* recognized that "[a]n improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted." 434 U.S. at 512 (footnote omitted). The Court further recognized that curative instructions "will not necessarily remove the risk of bias that may be created by improper argument." *Id.* at 513. For that reason, "[u]nless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases." *Id.*

A problem remained, however: "The interest in orderly, impartial procedure would be impaired if [the trial judge]

were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred." *Id.* at 513. The need to enable a trial judge "to protect the integrity of the trial" militated against "a stringent standard of appellate review in this area." *Id.* at 513 (internal quotation marks and citation omitted). For this reason, held the Court, "a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference." *Id.* at 514. Indeed, such a decision is entitled to "special respect" on appeal, *id.* at 510, the same level of deference afforded a trial court's decision to order a mistrial in the face of a deadlocked jury. *Id.*

This Court explained why it is willing to leave such a weighty decision to the sound discretion of the trial judge:

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more conversant with the factors relevant to the determination than any reviewing court can possibly be.

*Id.* at 513-14 (footnote omitted; internal quotation marks and citation omitted).

Accordingly, it does not matter that, in a given case where a mistrial was declared, "some trial judges might have

proceeded with the trial after giving the jury appropriate cautionary instructions." *Id.* at 511. Although this means that "[i]n a strict, literal sense" a mistrial was not "necessary," "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's" mistrial ruling. *Id.*

Applying these principles to the facts before it, the Court held that the trial judge exercised "sound discretion." The judge declared a mistrial because defense counsel's opening statement improperly commented on the fact that, during the defendant's first trial, the prosecution failed to turn over exculpatory evidence. *Id.* at 499-501, 516. This Court observed that "the trial judge was in the best position to assess" the impact on the jury of the improper opening statement, and that the judge gave both parties the opportunity to discuss whether a mistrial was appropriate. *Id.* at 515-16. Although defense counsel argued that "cautionary instructions" would have cured any problem, *id.* at 515 n.34, the Court ruled that the trial judge's decision should be respected. *Id.* at 516.[2]

2. By stark contrast, the Wisconsin Supreme Court launched into *de novo* review of the trial court's painstaking decision to declare a mistrial.

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[2] Although *Arizona v. Washington* came to this Court on review of a grant of federal habeas corpus relief, the Court did not base its decision on that fact. To the contrary, after stating that "compelling institutional considerations militat[e] in favor of appellate deference," the Court inserted a footnote stating that "[t]hese considerations must be at least as weighty where a federal court, in considering a state prisoner's collateral challenge to his conviction on the ground that it violated the Double Jeopardy Clause, reviews the determination of a state trial judge as to juror bias." *Id.* at 513-14 & n.33.

> We must determine whether "the [trial] court erred [in the third trial] when it determined that the State met its burden of showing the requisite manifest necessity to support the mistrial order that terminated" the defendant's third trial.

App. A9, ¶32 (quoting *State v. Seefeldt,* 261 Wis. 2d 383, ¶13, 661 N.W.2d 822, ¶13).

Rather than reviewing the record with the understanding that the trial judge "is far more conversant with the factors relevant to the determination than any reviewing court can possibly be," *Washington*, 434 U.S. at 514 (internal quotation marks and citation omitted), the Wisconsin Supreme Court emphasized the high burden that is on the State to justify a mistrial. *See, e.g.,* App. A12, ¶40; App. A27, ¶80. The court rejected the trial judge's ruling based on its own, independent assessment that defense counsel's error could have been cured through the State's closing argument and a curative instruction.

It may be that the Wisconsin Supreme Court was correct in its assessment of how the jury would have responded to the closing arguments and instructions. But the very nature of deferential review is that an appellate court may not replace a trial judge's judgment with its own merely because the appellate court would have reached a different result. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) ("The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."). *Also see Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985) (the "clearly erroneous" standard does not permit a reviewing court to reverse a trier of fact's finding, "simply because it is convinced that it would have

decided the case differently"). The trial judge in this case "has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors." *Washington*, 434 U.S. at 513-14. The Wisconsin Supreme Court manifestly failed to grant the trial judge the deference he is owed under *Arizona v. Washington*.

Indeed, the need for a mistrial in this case was far greater than in *Arizona v. Washington*. Whereas in *Washington*, defense counsel merely made one improper point (regarding the prosecutor's failure to turn over evidence in the prior trial), here, the entire crux of the opening statement was devoted to telling a story that, in the end, was not supported by any evidence presented at trial. It is one thing to instruct a jury to disregard one discrete assertion made by defense counsel, an assertion unrelated to whether, in fact, the defendant committed the crime. It is a far more problematic thing to instruct a jury to disregard the defendant's entire version of events as conveyed by his counsel. And, as even the Wisconsin Supreme Court recognized, Moeck's Fifth Amendment privilege against self-incrimination complicated efforts to cure the problem. App. A24, ¶74; A26, ¶77 n.47.

All told, the trial judge's decision to grant a mistrial was manifestly reasonable and was entitled to deference. The Wisconsin Supreme Court's decision, in the words of a distinguished jurist remarking on a similarly wrongheaded opinion, leaves *Arizona v. Washington* "in a badly damaged state." *Gilliam v. Foster*, 75 F.3d 881, 905 (4th Cir.) (Wilkinson, J., dissenting), *cert. denied*, 517 U.S. 1220 (1996).

## II. FEDERAL COURTS OF APPEAL AND STATE APPELLATE COURTS ARE DIVIDED OVER WHAT, IF ANY, DEFERENCE IS OWED TO A TRIAL COURT'S DETERMINATION THAT CONDUCT BY THE DEFENSE CREATED A MANIFEST NECESSITY FOR DECLARATION OF A MISTRIAL.

There is strong disagreement among federal and state courts as to how much deference is owed to a trial judge's determination that a mistrial caused by defense trial error is manifestly necessary. Some courts review the question of "manifest necessity" *de novo*. Others treat the issue of "manifest necessity" as a mixed law and fact question with the legal component subject to *de novo* review. Still others give great deference to the trial court's determination as, we submit, this Court in *Arizona v. Washington* intended. There is a sharp split among the federal circuits and an equally sharp split among the state high courts.

### *Federal Decisions*

Six circuits of the federal courts of appeal have issued decisions that gave little or no deference to the trial court's mistrial declaration. *See United States v. Rivera,* 384 F.3d 49, 55 (3d Cir. 2004) ("manifest necessity" is a mixed law-fact question subject to "plenary" review); *United States v. Toribio-Lugo,* 376 F.3d 33, 39 (1st Cir. 2004) (there is no "manifest necessity" when trial court fails to adequately explore alternatives to mistrial); *Brady v. Samaha,* 667 F.2d 224, 229 n.6 (1st Cir. 1981) (review of exercise of discretion and the existence *"vel non"* of "manifest necessity" are questions of law or, at least, mixed law-fact questions); *Gilliam v. Foster,* 75 F.3d at 894-95; *United States v. Sloan,* 36 F.3d 386, 394-95 (4th Cir. 1994); *Johnson v. Karnes,* 198

F.3d 589, 593-96 (6th Cir. 1999); *United States v. Sammaripa,* 55 F.3d 433, 434-35 (9th Cir. 1995); *United States v. Chica,* 14 F.3d 1527, 1531 (11th Cir. 1994) (The Supreme Court "has . . . instructed us to require a high degree of necessity before we conclude" a mistrial over defense objection was appropriate; "we review the entire record in the case without limiting [ourselves]" to the trial court's findings to determine whether mistrial was manifestly necessary [internal quotation marks and citation omitted].).[3]

By contrast, four other circuits of the federal courts of appeal have given a high degree of deference to a trial court's mistrial declaration. *See United States v. Melius,* 123 F.3d 1134, 1138 (8th Cir. 1997) (because the extent of juror bias is difficult to measure, the trial court's evaluation that jurors may have been biased by defense misconduct is entitled to the highest degree of respect); *United States v. Combs,* 222 F.3d 353, 359-60 (7th Cir. 2000) (upholding mistrial declaration due to defense counsel's conflict of interest because any conviction would be subject to challenge on appeal for that reason); *Testa v. Village of Mundelein, Ill.*, 89 F.3d 443, 445-46 (7th Cir. 1996) ("A trial judge has particularly broad discretion in determining whether an incident, in the context of an entire trial, is so serious to warrant a mistrial."); *United States v. Mastrangelo,* 662 F.2d 946, 952-53 (2d Cir. 1981). *Also see United States v. Berroa,* 374 F.3d 1053, 1056-60 (11th Cir. 2004) (record review shows trial judge properly exercised discretion in declaring a mistrial due to a deadlocked jury even though judge erred in not consulting the parties and did not explore alternatives).

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[3] *See also Ross v. Petro,* No. 5:04CV849, 2005 WL 1126758, *22-*24 (N.D. Ohio May 3, 2005) (federal habeas court would not defer to state appellate court ruling that deferred to trial judge's "manifest necessity" finding because it was contrary to *Arizona v. Washington*).

***State Court Decisions***

Several state appellate courts have made the same error as the Wisconsin Supreme Court, giving little or no deference to the trial court's mistrial declaration. *See Douglas v. United States,* 488 A.2d 121, 133-34 (D.C. 1985) (appellate court reviews record to see whether events at trial were sufficiently serious and whether there were any measures short of mistrial that would have cured any perceived prejudice); *Jackson v. State,* 855 So. 2d 178, 180 (Fla. Dist. Ct. App. 2003); *Rodriguez v. State,* 719 So. 2d 1215, 1216-17 (Fla. Dist. Ct. App. 1998); *Spaziano v. State,* 429 So. 2d 1344 (Fla. Dist. Ct. App. 1983); *People v. Dahlberg,* 823 N.E.2d 649, 655-57 (Ill. App. Ct. 2005); *People v. Largent,* 786 N.E.2d 1102, 1107 (Ill. App. Ct. 2003) (the prosecutor has the same burden on appeal as he does at trial to prove a "manifest necessity" when a trial judge declares a mistrial *sua sponte* over defense objection); *In re Minnis,* 29 P.3d 462, 464 (Kan. Ct. App. 2001) ("In assessing the judge's exercise of discretion, an appellate court determines whether there was a 'manifest necessity' for a mistrial or whether the ends of public justice would otherwise be defeated."); *State v. Gould,* 743 A.2d 300, 302 (N.H. 1999) ("Although we generally defer to a trial court's discretion in declaring a mistrial, especially where the defendant's conduct triggered [the mistrial] declaration [citation omitted], it is our duty to ensure that the 'scrupulous exercise of judicial discretion led to the decision.'"); *Commonwealth v. Rivera,* 715 A.2d 1136, 1139-40 (Pa. Super. Ct. 1998) (because there were available alternatives to address counsel's improper question, there was no "manifest necessity"; trial judge abused discretion in declaring mistrial); *State v. Sheets,* No. 22926-2-III, 2005 WL 1432503, *3, *5 (Wash. Ct. App. June 21, 2005) (record lacks "extraordinary and striking circumstances" and a curative instruction should have been given).

By contrast, at least four States' highest courts complied with *Arizona v. Washington* and gave a high degree of deference to a trial court's mistrial declaration. *See Tubbs v. State,* 583 S.E.2d 853, 857-58 (Ga. 2003) (appellate court deferred to mistrial declaration caused by improper defense opening statement despite availability of curative instruction because existence of alternatives does not render mistrial declaration an abuse of discretion); *Pleas v. State,* 495 S.E.2d 4 (Ga. 1998); *Grimes v. McAnulty,* 957 S.W.2d 223, 224-25 (Ky. 1997) (there are "compelling institutional considerations" favoring appellate court deference to a trial court's evaluation of potential jury bias as a result of defense error), *cert. denied*, 525 U.S. 824 (1998); *Lovett v. Commonwealth,* 472 N.E.2d 236, 238-39 (Mass. 1984) (upholding mistrial declared after defense counsel told the jury in opening statement why his client elected not to testify); *Bailes v. Jolliffe,* 541 S.E.2d 571, 575-76 (W.Va. 2000).[4]

Courts have also split on the narrower issue whether improper opening statements by defense counsel can create a manifest necessity for a mistrial. Some courts, such as the

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[4] *See also Commonwealth v. Murray,* 496 N.E.2d 179, 180-81 (Mass. App. Ct. 1986); *State v. Levison,* 510 N.W.2d 495 (Neb. Ct. App. 1993) (upholding mistrial declared after defense counsel referred in opening statements to evidence he thought would be admissible only to have trial court rule later it was inadmissible); *State v. Colvin,* No. 04AP-421, 2005 WL 704818, *9-*10 (Ohio Ct. App. March 29, 2005) (upholding declaration of mistrial in response to improper closing argument by defense counsel and expressly refusing to apply the less deferential review employed by the Sixth Circuit in *Johnson v. Karnes,* 198 F.3d 589, choosing to rely instead on the dissenting opinion in *Karnes*); *State v. Bayse,* 859 P.2d 542 (Or. Ct. App. 1993) (mistrial upheld where defense counsel repeatedly undercut pretrial ruling not to refer to evidence of child abuse); *In re S.G., Jr.,* 935 S.W.2d 919 (Texas Ct. App. 1996) (mistrial upheld based on improper questions put by defense counsel to a juvenile witness).

Wisconsin Supreme Court here, have given defense counsel almost limitless leeway so long as there is no bad faith; curative instructions and closing arguments will remedy any problems. *See, e.g., Gilliam, supra,* 75 F.3d 881; *Sloan, supra,* 36 F.3d 386; *see also Jackson, supra,* 855 So. 2d 178. Other courts have deferred to a trial judge's declaration of a mistrial if they agree the opening statements were such that they threatened the impartiality of the jury's verdict; the availability of a curative instruction is not controlling. *See, e.g., Tubbs, supra,* 583 S.E.2d at 857-58; *Grimes, supra,* 957 S.W.2d at 224-25; *Lovett, supra,* 472 N.E.2d at 238-39; *Levison, supra,* 510 N.W.2d at 497-500.

The many state and federal decisions that have strayed from *Arizona v. Washington*, the State believes, share two common flaws: (1) They engage in a two-tiered review of the mistrial declaration; and (2) they review the entire record for reasons to undermine, rather than uphold, the trial court's exercise of discretion.

*The Two-Tiered Approach.* These courts review the issue of "manifest necessity" *de novo,* or as a mixed law-fact question, then profess to review the mistrial declaration based thereon for abuse of discretion. But, if they independently determine that the judge erred in finding a "manifest necessity," then *a fortiori* they will hold that the trial judge abused his or her discretion in declaring a mistrial. Conversely, if they independently determine that there was a "manifest necessity," then they will hold there was no abuse of discretion. This is, in the end, nothing other than independent review of both the "manifest necessity" finding and the mistrial declaration based thereon.

In *United States v. Sloan,* 36 F.3d 386, for example, the trial judge *sua sponte* declared a mistrial over defense objection where defense counsel presented a "Horatio Alger"

account of defendant's life in opening statements, *id. at* 389, 397-98, and the trial judge relied, in his evidentiary rulings, on defense counsel's repeated assurances throughout trial that his client would testify. *Id.* at 389-92. The Fourth Circuit Court of Appeals concluded, after its "painstaking" review of the record, *id.* at 401, that there was no "manifest necessity" because the trial judge failed to explore alternatives and the defendant has the right to decide at any time that he does not wish to testify. Accordingly, the trial judge did not properly exercise discretion. *Id.* at 399-401.

In *Johnson v. Karnes,* 198 F.3d 589, the state trial judge declared a mistrial when defense counsel erroneously asked a witness about the defendant's acquittal of a robbery charge in a previous trial. On federal habeas review of the state conviction, the Sixth Circuit Court of Appeals held that the trial judge unreasonably applied controlling United States Supreme Court precedent in finding a "manifest necessity" because there were available alternatives; consequently, it held the trial judge failed to exercise sound discretion. *Id.* at 595-96, 597. This result caused the dissenting judge to comment: "[T]he attorney's tactics (intentional or not) were brilliant. Future defense attorneys will no doubt pay close attention." *Id.* at 597 (Boggs, J., dissenting).

Finally, in *Spaziano v. State,* 429 So. 2d 1344, involving an auto theft prosecution, defense counsel told the jury in opening statements that the defendant borrowed the car from an acquaintance. The defense rested without putting on any evidence. The court and the attorneys could not agree on a curative instruction. *Id.* at 1345. The Florida court held that the prosecution failed to meet its heavy burden of proving a "manifest necessity" because the defense is free to make a tactical change as the trial proceeds so long as it is done in good faith. *Id.* at 1346. The court never mentioned the abuse of discretion standard for review. *Also see United States v.*

*Rivera,* 384 F.3d at 57-58 (because there were available alternatives, there was no "manifest necessity;" therefore, trial judge did not exercise sound discretion in declaring a mistrial).

*Plenary Review of the Record.* Most of the appellate decisions reversing trial court mistrial declarations are decidedly lengthy. *See, e.g.,* App. A1-62; *Gilliam, supra; Sloan, supra.* They are so because those appellate courts engaged in independent review of the entire trial court record. Plenary record review is permitted by *Arizona v. Washington,* but for far narrower reasons. An appellate court should search the record to determine whether it provides "sufficient justification" for a mistrial ruling where the trial court did not make a specific "manifest necessity" finding. *Washington,* 434 U.S. at 516-17. And an appellate court may engage in plenary record review to determine whether the trial judge's decision was "irrational[] or irresponsibl[e]." *Id.* at 514. That is all.

As a result of these non-deferential approaches, appellate courts across the land find themselves engaging in the very same plenary review for trial court error that was reviewed and condemned by this Court in *Arizona v. Washington.* As did the majority opinion here, this non-deferential approach has spawned vigorous dissents in many courts. These are invariably cases where the majority launched into *de novo* review of the record with an eye toward overturning the mistrial declaration, while the dissenting judges reviewed the record (properly) for reasons to uphold the trial court's discretionary decision.[5]

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[5] *See* App. A28-33, ¶¶82-93 (Wilcox, J., dissenting), App. A33-62, ¶¶94-178 (Prosser, J., dissenting); *Gilliam,* 75 F.3d at 908-12 (Wilkinson, J., dissenting), 913-15 (Niemeyer, J., dissenting), 915-16, 922-26 (Luttig, J., dissenting); *Sloan,* 36 F.3d at 402-06 (Niemeyer, J., dissenting) (the

*(footnote continued)*

Whether the Double Jeopardy Clause bars or permits retrial, then, depends on one's jurisdiction. This Court should grant certiorari and make clear that it meant what it said in *Arizona v. Washington*, namely, that appellate courts must apply a highly deferential standard of review when determining whether a trial court acted reasonably in declaring a mistrial over defense objection where the problem was occasioned by defense misconduct. The issue for the appellate courts is not whether the mistrial declaration was complete or even correct; it is only whether the mistrial declaration was reasonable.

## III. THIS CASE INVOLVES A RECURRING ISSUE OF NATIONAL IMPORTANCE.

Trial errors committed by the defense are particularly problematic because an acquittal caused by such errors cannot be remedied. The State, of course, has no right to challenge an acquittal on appeal even where "the acquittal was based upon an egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962), *cited in Arizona v. Washington*, 434 U.S. at 503. It can scarcely be denied that the government's—and the public's—interest in avoiding unfairly-obtained acquittals is great.

Nor can it be denied that the government and the public have a significant interest in preventing defendants from walking free because of mistrials declared based on their own counsels' errors. The Double Jeopardy Clause, how-

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applicable standard for review is whether the trial court's decision was "irrational or an abuse of discretion"); *Karnes*, 198 F.3d at 597-99 (Boggs, J., dissenting); *Douglas*, 488 A.2d at 146-50 (Belson, J., dissenting); *State v. Sheets*, 2005 WL 1432503, at *5-*6 (Brown, J., dissenting).

ever, invariably calls for that result whenever an appellate court concludes the trial judge erroneously declared a mistrial over the defendant's objection, even when the error was caused by the defense.

It is precisely to guide trial judges as they steer between the Scylla of unfairly-obtained acquittals and the Charybdis of overturned mistrials that this Court commands appellate courts not to disturb mistrial declarations based on defense error unless they are "irrational[] or irresponsibl[e]." *Arizona v. Washington*, 434 U.S. at 514. The Wisconsin Supreme Court's decision, and similar decisions by federal and state courts around the country, undermine the solution crafted in *Arizona v. Washington* and place prosecutors and trial judges in an untenable position. The practical problems created by non-deferential review are myriad.

*Mistrials will not be declared even when they ought to be.*

Criminal trials must be fair but, as with any other human endeavor, they are not perfect. Defense errors, such as the improper opening statement under review here, are common. Trial judges need sufficient room to act to protect the rights of both the State and the defense to a fair trial by an impartial jury. Overly restrictive appellate review will pressure trial judges not to declare mistrials even when necessary to protect against the risk of irreparable jury taint.

As noted, the Double Jeopardy Clause bars retrial of a defendant after an erroneous declaration of a mistrial over his objection. It matters not that the defendant's subsequent trial was fair and error-free. Consequently, if trial judges know that a "close call" will be second-guessed by an appellate court, they will shy away from declaring mistrials even in an egregious situation such as that presented here. As

Professor LaFave has observed, "lurking in the background is the recognition that an appellate court ruling holding that the trial judge improperly . . . order[ed] a mistrial operates to deprive the state of any full opportunity to establish the guilt of a person who well may be guilty." 5 Wayne R. LaFave et al., *Criminal Procedure,* § 25.2(c), at 654 (2d ed. 1999).[6]

Trial judges will not be the only ones to become gun shy. Decisions such as that by the Wisconsin Supreme Court will make prosecutors understandably reluctant to seek mistrials based on defense counsel errors—however strongly they believe a mistrial is warranted. As this Court recognized in *Washington*, however, sometimes "the overriding interest in the evenhanded administration of justice" justifies a mistrial. 434 U.S. at 511.

*Defense counsel will have an incentive to make "errors" that favor their clients.*

In *Washington*, this Court found that mistrials are necessary to prevent "unscrupulous defense counsel" from obtaining "unfair advantage." 434 U.S. at 513. Because defense error may lead to an unjust acquittal from which the State has no right to appeal, the defendant has every incentive to build in error that favors him. The refusal of appellate courts to defer to mistrial declarations will only encourage defense mischief.

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[6] "The dearth of reported cases on the specific issue of mistrials caused by defense attorney misconduct suggests that most trial courts are reluctant to declare mistrials over defense objections and consequently opt to resolve such problems through the use of their contempt power, allowing the state to suffer the consequences of defense counsel's misconduct. Although this reluctance is understandable, it is hardly fair." *Quinones v. State,* 766 So. 2d 1165, 1171 n.7 (Fla. Dist. Ct. App. 2000).

As it now stands in Wisconsin (and many other States), defense attorneys are free to say whatever they wish in opening statements if they are willing to risk personal sanctions. The prosecutor's only recourse is to draft a tepid curative instruction. Sanctions such as contempt of court or professional discipline do nothing to guarantee the jury's impartiality. In those cases where the stakes are the highest, the temptation for defense counsel to obtain a verdict "based upon an egregiously erroneous foundation" may well overcome whatever deterrence lies in economic or disciplinary sanctions.

In addition, unscrupulous defendants might on their own obtain an unfair advantage even against the advice and strategy of their attorneys. The savvy defendant may, to avoid cross-examination, deceive his own attorney by deciding not to testify after the attorney had just put before the jury the defendant's exculpatory account in the good faith belief that his client would testify. App. A32-33, ¶92 (Wilcox, J., dissenting).

*Efforts by trial courts to cure defense counsel errors (rather than declare a mistrial) will often lead to reversals of convictions.*

An opening statement by defense counsel that promises evidence not produced, refers to inadmissible evidence, or summarizes a defendant's exculpatory account in a case where the defendant decides not to testify is professional misconduct that can have a powerful impact on the jury leading to an unjust acquittal. *See United States v. Dinitz*, 424 U.S. at 612 (Burger, C.J., concurring). If conviction still results, the likelihood of reversal for a violation of the

defendant's privilege against self-incrimination or ineffective assistance of counsel is great.[7]

As to the former, it is well established that a prosecutor may not comment on a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 614-15 (1965). To be sure, there are circumstances where a defendant "opens the door" to a measured response by the prosecutor to references to silence in the defense case. *See United States v. Robinson*, 485 U.S. 25, 31-34 (1988); *Lockett v. Ohio*, 438 U.S. 586, 595 (1978). As the Wisconsin Supreme Court acknowledged, however, it "is impossible to draw a bright line for all cases between permissible and impermissible comment." App. A24, ¶74 (internal quotation marks and citation omitted).

Whether that "door" is opened, and whether a response is sufficiently "measured," are the sort of nebulous issues that cause reversals on appeal. Indeed, in response to the State's argument in this case that a curative instruction risked reversal on Fifth Amendment grounds, the Wisconsin Supreme Court could only respond: "Perhaps, but a reversal would enable the State to bring yet another prosecution." App. A26, ¶77 n.47. The objectives of the Double Jeopardy Clause are hardly served by assurances that, had the trial

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[7] *See Barrow v. Uchtman*, 398 F.3d 597, 606-08 (7th Cir. 2005); *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257-60 (7th Cir. 2003). *Also see United States v. Gomez*, 120 Fed. Appx. 930, 2005 WL 271459 (3d Cir. Feb. 4, 2005) (*sua sponte* mistrial declaration upheld where it was done to protect defendant from the ineffective assistance of counsel and, presumably, to avoid a subsequent appeal and reversal); *United States v. Combs*, 222 F.3d 353, 359-60 (7th Cir. 2000) (mistrial declaration upheld because defense counsel's conflict of interest would have subjected any conviction to reversal on appeal).

judge taken a different route, the defendant may well have had to face another trial anyway.

Even where a defendant's Fifth Amendment rights are not violated by curative instructions and prosecution argument, the potential for reversible error would simply shift from the Fifth Amendment to the Sixth Amendment. *See United States v. Combs*, 222 F.3d at 359-60. As the Wisconsin Court of Appeals acknowledged, "[a]n attorney's failure to produce promised evidence is not lost on a jury. The result can be devastating." App. A71, ¶15. Unwise strategic decisions by defense counsel that lead directly to "devastating" results make for compelling ineffective assistance of counsel challenges. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Barrow v. Uchtman*, 398 F.3d 597, 607 (7th Cir. 2005) (unfulfilled promises by defense counsel in opening statements to present the defendant's testimony are highly suspect under *Strickland v. Washington*).

Making matters worse, "the more effective the prosecutor's commentary" to the jury on the failure of defense counsel to present evidence supporting his opening statement, "the more likely [a defendant] would have . . . a claim for ineffective assistance of counsel." App. A62, ¶174 (Prosser, J., dissenting). This Court's decision in *Arizona v. Washington* has the laudatory effect of eliminating this conundrum. It should be reaffirmed.

## CONCLUSION

This Court should grant certiorari and reverse the decision of the Wisconsin Supreme Court.

Respectfully submitted,

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